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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 293

HICKEY & COMPANY, A PARTNERSHIP COMPOSED OF WILLIAM L. HICKEY, LOUIS W. HICKEY AND JUSTIN D. O'BRIEN, AS PARTNERS AND INDIVIDUALLY, PETITIONERS

v.

UNITED STATES OF AMERICA AND ROBERT P. PATTERSON, SECRETARY OF WAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The oral opinion of the United States District Court for the Northern District of Texas (R. 74–76) has not been reported. The *per curiam* opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 84–85) is reported at 168 F. 2d 752.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on June 25, 1948 (R. 85). The petition for a writ of certiorari was filed on September 22, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254 (1)).

QUESTIONS PRESENTED

1. Whether the First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended by Section 801 of the Revenue Act of 1942, 56 Stat. 798, 982) authorized unilateral determinations of excessive profits.

2. Whether petitioners' failure to petition the Tax Court for a redetermination of the amount of their excessive profits for the calendar year 1942 bars them, in a collection suit by the Government, from attacking the Departmental renegotiation order on the ground that renegotiation was not timely commenced within one year after the close of 1942.

3. Whether, on the assumption that the issue of timely commencement of renegotiation may be examined and determined in the present case, the War Department commenced renegotiation of petitioners' renegotiable business for 1942 within one year after December 31, 1942.

STATUTES INVOLVED

Pertinent portions of the Renegotiation Act are set forth in the Appendix, *infra*, pp. 18–20.

STATEMENT

This case involves a suit by the United States to collect an amount alleged to be owed by petitioners, pursuant to a determination under the Renegotiation Act that petitioners made excessive profits on a war contract performed in 1942. The action was instituted on October 21, 1946, in the District Court for the Northern District of Texas to recover judgment for $68,240.50, with interest at 6% from April 12, 1946, the date of the War Department's determination of excessive profits (R. 1–4). The complaint alleged that, after notice to petitioners, proceedings for the renegotiation of petitioners' renegotiable business for their fiscal year ending December 31, 1942 were conducted by representatives of the Secretary of War; that, thereafter, on April 12, 1946, the Chairman of the War Department Price Adjustment Board, acting under the Renegotiation Act and in accordance with authority duly delegated to him, determined that during the year 1942 petitioners had realized $80,000 excessive profits on its renegotiable business; that on the same day the Chairman of the War Department Price Adjustment Board directed the petitioners to repay to the Treasury of the United States, on or before

May 3, 1946, the amount of excessive profits so determined less the applicable tax credit; that the applicable tax credit amounted to $11,759.42; that no part of the amount of excessive profits so determined had been paid; and that no part of the amount had been withheld or eliminated by any other method (R. 2–8). It was also alleged that petitioners had not petitioned the Tax Court of the United States for redetermination of the excessive profits and that the time for filing such a petition had expired (R. 3–4).

Petitioners' answer (R. 9–14) admitted the making of the excessive profits determination as set forth in the complaint (R. 9–10), the direction to pay the net amount of the excessive profits as determined (R. 9–10), their refusal to comply, the nonpayment of the demand by withholding or otherwise, their failure to petition the Tax Court and the expiration of the statutory period allowed for filing such a petition (R. 9–10). The answer did, however, dispute the amount of the appropriate tax credit (R. 10), and, as affirmative defenses, raised a large number of issues of constitutional validity and statutory interpretation. Among these defenses were the two issues now raised by the petition for a writ of certiorari: *i. e.* (i) the Renegotiation Act applicable to 1942 business did not authorize unilateral determinations by the Secretary of War or his agents (R. 11–12); and (ii) the renegotiation proceedings

relative to petitioners' profits were not "commenced within the time permitted by the pertinent statutes" (R. 12).

At the hearing, the parties stipulated the facts to be considered (R. 15–74). It was agreed that petitioner had had one renegotiable construction contract with the War Department, in the amount of $897,103.05, awarded as a result of competitive bidding on May 2, 1942, and completed in the year 1942; that the contract contained no provision for renegotiation (R. 16–17); that the War Department's excessive profits determination allowed petitioners a net profit of 14.67 per cent (R. 17–18); and that on the basis of petitioners' income tax returns for 1942 and 1943 the allowable tax credit on the renegotiation refund would be $11,759.42, but that the Treasury Department was questioning this return and might levy deficiency assessments against petitioners, which in turn might require recomputation of the appropriate tax credit (R. 21–22).

The following facts concerning the commencement and process of petitioners' renegotiation are also included in the stipulation: In June 1943, petitioners' business was assigned for renegotiation to the Southwestern Division of the Corps of Engineers, at Dallas, Texas (R. 23–26); and petitioners were requested by letter of July 6, 1943, from the Southwestern Division, to transmit certain contractual and income data regarding their

war business with the War and Navy Departments or the Maritime Commission on an enclosed official form (R. 26–30). This request was repeated over the telephone on July 15, 1943 (R. 19, 31), and in a second letter dated July 21, 1943 (R. 31–32). A letter of August 24, 1943 requested similar information for business done with the four subsidiaries of Reconstruction Finance Corporation which were added to the Renegotiation Act by the amendment of July 1, 1943 (57 Stat. 347) (R. 32–34). On September 7, 1943, petitioners received a telephone call from a War Department renegotiation official in Washington, asking that the requested information be supplied, and petitioners' representative indicated that they would meet with the War Department's representative (R. 18–19, 55–57); on September 23, 1943, one of the War Department's renegotiation representatives stationed at Dallas reiterated, over the telephone, the request for the required information, and asked for a conference with petitioners which was to take place when petitioners became less busy (R. 19, 57–59). On the same day, after the foregoing calls, petitioners wrote to the Southwestern Division, returning the official forms in blank with the notation that "All of the information above sought has been in the possession of the Federal Government for several months and most of it for considerably more than a year," and setting forth a long diatribe against

the Renegotiation Act and its philosophy (R. 47–52). On December 14, 1943, a War Department renegotation agent again telephoned petitioners asking that they furnish the information originally requested in July 1943 (R. 19).

In May 1944, two of the petitioners were served with a subpoena, under Title XIII of the Second War Powers Act, 50 U. S. C. App. 643–643c and Executive Order No. 9127 (3 CFR, Cum. Supp., p. 1138), requiring them to produce their books and records, and to testify concerning their 1942 renegotiable business, at a renegotiation hearing at Dallas (R. 19, 60–63). At this hearing, the two petitioners refused to testify or to produce the subpoenaed books and records (R. 19–20, 63–65). Thereafter, on August 24, 1944, a renegotiation official called upon petitioners to repeat the request for information (R. 19), and the Office of the Chief of Engineers followed suit with a letter on September 16, 1944 (R. 35–38).

Petitioners having continued to refuse the pertinent information (R. 20), in November 1945 the Southwestern Division advised that on the basis of the data available to it petitioners' excessive profits during 1942 appeared to amount to $80,000, but that the matter would be held open for some days for a conference, if petitioners desired it (R. 38–40). After the case was transmitted to Washington, the Office of the Chief of Engineers also gave petitioners opportunity to

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appear and confer concerning the renegotiation (R. 40–41). The War Department Price Adjustment Board did likewise (R. 42). Apparently, petitioners did not avail themselves of these opportunities, and on April 12, 1946, the Chairman of the War Department Price Adjustment Board—who was possessed of the necessary delegated authority (R. 20–21)—unilaterally determined petitioners' excessive profits to have been $80,000 (R. 20, 43–46).

On the basis of these stipulated facts, the District Court held for the United States (R. 74–76) and entered judgment in the amount prayed, saving petitioners' right "to proper credit hereon by virtue of payments hereafter made to the United States by reason of any deficiency assessments of income taxes for the years of 1942 and 1943 or to proper credit on any such deficiency assessments by reason of any payment made hereon" (R. 77–78).

On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment, in a *per curiam* opinion, on the authority of *Lichter* v. *United States*, 334 U. S. 742 (R. 84–85).

ARGUMENT

Both of the issues of interpretation of the Renegotiation Act which petitioners bring to this Court are, we submit, squarely governed by *Lichter* v. *United States*, 334 U. S. 742, and *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841.

In addition, each of these statutory contentions, reviewed apart from last term's decisions, is plainly wrong.[1]

1. After the *Lichter, Alexander* (decided with the *Lichter* case), and *Lincoln Electric* decisions,[2] upholding unilateral determinations under the First Renegotiation Act, it is hardly open to argument that the Renegotiation Act, as it applied to petitioners' 1942 renegotiation business, authorized a unilateral determination by the Secretary of War, if agreement with the contractor could not be had. 334 U. S. at 769, 791.[3] Independently of this definitive authority, the same conclusion is compelled by the language of the Act, its history, and the administrative practice under it. Section 403 (a), both as originally enacted and as reenacted on October 21, 1942,

[1] In this Court, petitioners expressly disavow the attack on the constitutionality of the Renegotiation Act which they pressed below (Br. 12, 26, 46), and their "Reasons Relied On For the Allowance of the Writ" (Pet. 2–3) and "Specification of Errors" (Br. 7) refer only to two statutory questions. Their brief, however, is studded with direct and oblique constitutional arguments—all of which were rejected by the Court in *Lichter* v. *United States*, 334 U. S. 742, and *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841.

[2] This issue was expressly presented by Lincoln Electric Company. Statement as to Jurisdiction, No. 320, Oct. Term 1947, p. 17.

[3] The narrowest answer to petitioners' contention is, of course, that the Tax Court was fully competent to decide the question of the Secretary's power to issue a unilateral order, and their failure to petition that tribunal bars them in this action, even if the substantive point were theoretically valid. *Lichter* v. *United States*, 334 U. S. 742, 791–792.

defined the terms "renegotiate" and "renegotiation" to "include the refixing by the Secretary of the Department of the contract price." *Infra*, pp. 18, 19. This provision was specifically inserted in order to permit unilateral determinations. 88 Cong. Rec. 3380, 3650 (Senators McKellar, Taft).[4] The first such order was issued in June, 1943, and thereafter this mechanism was consistently used in cases in which no satisfactory bilateral agreement with the contractor could be arranged. In the course of several hearings before Congressional committees in 1943, the Congress was repeatedly informed of the renegotiating agencies' view that they had power to issue unilateral

[4] Congressman Vinson, who was not a member of the conference committee, expressed a contrary view in the House at the time of original passage (88 Cong. Rec. 3585), but shortly thereafter recognized that the Act conferred power to issue unilateral orders. Hearings before a Subcommittee of the Senate Committee on Finance, on Sec. 403 of Pub. Law 528, 77th Cong., 2d sess. (September 1942), p. 80. Under Secretary of War Patterson, to whom petitioners refer in this connection (Br. 32–33), said, in September 1942, that there was doubt whether Congress actually intended, in the original enactment, to confer power to issue unilateral orders but that "the words clearly permit of such construction and it has been widely adopted by the business community." Hearings, *supra*, pp. 3–4. Subsequently, Mr. Patterson indicated that he had definitely concluded that the Act did give that power. Hearings before the Senate Committee on Finance, 78th Cong., 1st sess. on H. R. 3687 (November–December, 1943), p. 989.

orders, and of the exercise of this authority.[5] In none of these hearings or investigations was any doubt cast upon this power, which was uniformly assumed to exist or was expressly approved. For instance, the report of the House Naval Affairs Committee on renegotiation unquestioningly recognized the right of the agencies to issue compulsory orders, and stated that "where an impasse has been arrived at by the Board and the contractor, the situation should be resolved by proceeding with a unilateral determination." H. Rep. No. 733, 78th Cong., 1st sess., pp. 33, 59, 60 (October 7, 1943). Congress, as a whole, recognized the existence of this authority under the original statute in its enactment of the Second Renegotiation Act in February 1944 (Revenue Act of 1943, Title VII, 58 Stat. 21, 78). For Section 403 (e) (2) of the new Act expressly pro-

[5] See Hearings before the Subcommittee of the House Committee on Appropriations, 78th Cong., 1st sess., on Mil. Est. App. Bill for 1944 (June 1, 1943), p. 514: Hearings before the Subcommittee of the Senate Committee on Appropriations, 78th Cong., 1st sess., on H. R. 2996 (Mil. Est. App. Bill for 1944) (June 23, 1943), p. 137; Hearings before the House Committee on Naval Affairs, 78th Cong., 1st sess., pursuant to H. Res. 30, Vol. 2 (June 1943), pp. 506, 508, 970, 986; Hearings before the House Committee on Ways and Means, 78th Cong., 1st sess., on H. R. 2324, 2698, and 3015 "Renegotiation of War Contracts" (September 1943), pp. 71, 129, 139, 821, 842; Hearings before the Senate Committee on Finance, 78th Cong., 1st sess., on H. R. 3687 (Revenue Act of 1943) (November–December 1943), pp. 411, 417, 419, 677, 989, 1020, 1025, 1053.

vided for Tax Court redetermination of future unilateral orders issued with respect to fiscal years which continued to be governed by the first Act, and established the same remedy for contractors or subcontractors "aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943 * * * which is not embodied in an agreement." Absent authority to issue unilateral orders pertaining to renegotiable business ruled by the first Act, Section 403 (e) (2) would be entirely meaningless. Moreover, the Second Renegotiation Act (Revenue Act of 1943, Title VII) unmistakably gave the newly-created War Contracts Price Adjustment Board authority to make unilateral determinations respecting fiscal years ending after June 30, 1943 (Section 403 (c) (1)), and there is not the slightest indication that this power was considered novel or a variation from existing renegotiation practice. See S. Rep. No. 627, 78th Cong., 1st sess., p. 32; H. Rep. No. 871, 78th Cong., 1st sess., p. 76.

2. Petitioners' second statutory point—that the War Department did not commence renegotiation, as required by Section 403 (c) (6), within one year after the close of petitioners' fiscal year on December 31, 1942—is not available in this collection suit, since petitioners failed to seek a Tax Court redetermination. This issue is close kin to those held foreclosed in the *Lichter* case (and

its companions), 334 U. S. at 792. Like the statutory defenses sought to be raised in those cases, the contention is one which clearly could have been presented to the Tax Court,[6] and in effect amounts to a plea of exemption or non-coverage. If renegotiation was tardily begun, petitioners were exempt from all recapture, and the Tax Court, if its aid had been invoked, would have redetermined that no excessive profits had been made. But petitioners' "failure * * * to exhaust that procedure has left them with no right to present here issues such as those as to coverage and the amount of profits which might have been presented" to the forum established by Congress. 334 U. S. at 792. Cf. *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 544–545, and *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 767–773.

3. a. On the merits of their claim, petitioners must also fail. Under Section 403 (c) (6) (*infra*, pp. 19–20) of the applicable Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended by the Revenue Act of 1942, 56

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[6] The Tax Court has already passed three times upon the contention that a renegotiating agency failed to commence renegotiation within the allowable year. *J. H. Sessions & Son* v. *Secretary of War*, 6 T. C. 1236; *Spray Cotton Mills* v. *Secretary of War*, 9 T. C. 824; *The Blanchard Machine Co.* v. *RFC Price Adjustment Board* (T. C., Docket No. 208–R), decided March 18, 1948, now on petition for review in the Court of Appeals for the District of Columbia (No. 9925).

Stat. 798, 982), "renegotiation" had to be "commenced" by the War Department within one year after December 31, 1942. By the critical date (December 31, 1943), the Department had informed petitioners of their assignment to the Southwestern Division for renegotiation, had three times made written demand for the data necessary to renegotiation of their war business, and had repeated this request over the telephone on four separate occasions. A conference with petitioners was also expressly sought by the agency's representative several months before the expiration of the statutory year. Petitioners, however, refused to supply the requested information, and would not meet the Department's officers for the purpose of renegotiating their contract's price; and the departmental determination had ultimately to be made without recourse to petitioners' own data or consideration of their views as to the proper profit. *Supra,* pp. 5–8. In these circumstances, there can be no doubt that petitioners had the "fair, unequivocal, and unmistakable notice of the Secretary's intention to commence a renegotiation," within the permissible year, which the Tax Court stated in *J. H. Sessions & Son* v. *Secretary of War,* 6 T. C. 1236, 1244, would be sufficient compliance with Section 403 (c) (6).[7] See also *Spray Cotton Mills* v.

[7] Petitioners mistakenly pin their entire case on the *Sessions* decision, which dealt with a wholly different set of facts. There, the Tax Court held that renegotiation was not timely

Secretary of War, 9 T. C. 824, 833. Certainly the Department's long-continued efforts, before it issued the unilateral order in 1946, to induce petitioners to participate in the renegotiation process cannot obscure the fact that the process of attempting to examine petitioners' profits for excessiveness was begun in 1943. Nor did the abortive effort, in 1944, to compel petitioners to disclose the pertinent information (*supra,* p. 7) mark the commencement of renegotiation. Congress plainly desired the renegotiating agencies to make use of the drastic subpoena and judicial remedies afforded by Title XIII of the Second War Powers Act, 50 U. S. C. App., 643–643c, only after less forcible methods of securing information had failed.

b. The Tax Court, entrusted with a special status in renegotiation matters, has ruled that departmental action similar to that involved here constitutes timely commencement of renegotiation under Section 403 (c) (6). See cases cited *supra,*

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commenced by a single mimeographed letter from the War Department which simply stated that that Department "will be glad to receive any information which you may care to submit bearing upon the matter" of proper *assignment* of the contractor to a renegotiating agency "with the minimum of inconvenience to all concerned." The letter made no reference to actual renegotiation itself. And the desired information, as described in the letter, was of the type pertinent to assignment for renegotiation but hardly sufficient for the purposes of actual renegotiation. Even so, the contractor was informed: "Such information will in any case be received without prejudice to you." 6 T. C. at 1241–1242.

fn. 6, p. 13. And the consistent administrative practice of the agencies likewise demonstrates that renegotiation of petitioners' contract was not barred. The "Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations," issued March 31, 1943 (cf. 334 U. S. at 774), interpreted Section 403 (c) (6) "to mean that renegotiation commences on the specific date set by the Department conducting renegotiation for the initial renegotiation conference unless otherwise agreed by the contractor." Since the War Department was thwarted, by petitioners' intransigence, from holding the conference which it suggested, this early requirement was fulfilled. Compliance was even more clearly had with the later administrative interpretation—issued on May 27, 1943, and thereafter consistently followed—which put the commencement of renegotiation at the time when the first request was made upon the contractor for pertinent information. See Joint Renegotiation Manual, section 342.2; *Spray Cotton Mills* v. *Secretary of War,* 9 T. C. 824, 828–829, 834–835. This uniform construction followed by the operating agencies, and confirmed by the tribunal with special competence, has "peculiar weight," and should not be judicially overturned. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 275.

CONCLUSION

The decision below is correct, and the issues presented here are governed by recent decisions of this Court. We respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1948.

APPENDIX

1. The original Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, 56 Stat. 226, 245) provides in pertinent part:

> SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.
>
> * * * * *
>
> (c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to

the contractor or subcontractor, to recover such amount from such contractor or subcontractor. * * *

* * * * * *

2. The first amendment to the Renegotiation Act (Sec. 801 of the Revenue Act of 1942, Act of October 21, 1942, 56 Stat. 798, 982) provides in pertinent part:

> SEC. 403. (a) For the purposes of this section—
>
> * * * * *
>
> (3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.
>
> * * * * *
>
> (c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.
>
> * * * * *
>
> (6)
>
> * * * * *
>
> No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Sec-

retary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

* * * * * *

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